**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

TESTAMENTARY AND INTESTATE JURISDICTION

IN

NOTICE OF MOTION NO. 2202 OF 2004

IN

TESTAMENTARY PETITION NO. 17 OF 1984

IN

TESTAMENTARY PETITION NO. 12 OF 1983

WITH

NOTICE OF MOTION NO. 438 OF 2002

Harshad Jethalal Shah
& Anr. .. Petitioner.

vs.

Vasundra Raje Nimbalkar
& Ors. .. Defendants.

AND

Bhavesh Nareshchandra Amin
& Anr. .. Respondents.

AND

Maanish Kantilal Patel
& Anr. .. Applicants.

Mr. Virag Tulzapurkar with Ms. S. Srikrishna
i/by P.C. Mankad for the applicants.
Mr. T.N. Subramanian, Mr. Paresh Shah
i/by Shah & Sanghavi for plaintiffs.
Mr. A.Y. Bookwala, Ms. Madhvi Diwan
i/by Manisha Kapadia

for Defendant No.2 (c).

Mr. N.G. Thakker, Sr. Counsel, Mr. Gaurav Joshi
Mr. A.V. Joshi i/by Mulla & Mulla
for Respondents.

Mr. D. R. Patil, Representative of the
Court Receiver present.

**CORAM : S.U.KAMDAR, J.**

**DATE : 8th July,** 2005.

ORAL ORDER :

. By the present notice of motion the applicants are challenging clause 4 of the consent terms dated 15.4.2004 executed by and between the plaintiffs and the defendants. By prayer (b), (c) and (d) of the motion, the plaintiffs are claiming that they should be put back in possession of a property being bungalow and immovable property situated at Vishwas Colony, R.C. Datta Road, Sayaji Gunj, Division, Vadodara City of an area of 15,807 sq. ft. The plaintiffs have also prayed various interim injunctions against the parties from transferring, alienating, encumbering, dealing with and/or selling the said properties and/or from carrying on any construction thereon. Some of the material facts in the back ground of which the aforesaid reliefs are made are briefly enumerated as under :-

2. One Shalini Devi Ghatge died on 12.8.1982 leaving behind her last Will and Testament dated 4.8.1982. Under the said last will, Shalini Devi bequeathed an immovable property which is the subject matter of the present motion to the defendants. On the other hand, there was another will of the said deceased Salini Devi Ghatge dated 6.1.1982. It is the case of the applicants that the said property which was bequeathed to defendants was sold by the defendants under two agreements for sale dated 2.9.1982 to the applicants and in part performance thereof, the applicants were put in physical possession of the said property. It is their case that the defendant no. 1 has executed the said agreements for sale for himself and on behalf of the defendant no. 2 as his constituted attorney. Both the said wills were subject matter of two petitions in this Hon'ble Court, namely, Testamentary Petition NO. 12 of 1983 for letters of administration with the will annexed of Yeshwantrao Ghatge who was husband of Salini Devi and another Testamentary Petition No. 21 of 1983 for Letters of Administration with will annexed dated 6.1.1982 of Salini Devi. The plaintiffs in the present proceedings are the executors of the said last will and testament dated 6.1.1982 of the deceased Salini Devi. During the pendency of the said probate petition, a notice of motion was taken out being

notice of motion no. 786 of 1983 and notice of motion no. 910 of 1983 by the plaintiffs. By the aforesaid motions it was prayed that the Court Receiver, High Court, Bombay should be appointed in respect of the estate of the deceased including the property at Baroda. The applicant no.1's father and the 2nd applicant's husband who was also constituted attorney was respondent no. 3 in the said notice of motion no. 786 of 1983. In the said notice of motion various orders were passed. It is the case of the applicants that the said orders were passed without notice to the respondent no. 3 in the said Notice of Motion. In the aforesaid proceedings, the Court Receiver, High court, Bombay was appointed by an order dated 19.9.1983. In pursuant to the said order on 19.10.1983 the Court Receiver visited the suit property to take possession thereof. It is the case of the applicants that at the time of taking possession, the applicants were in actual physical possession of the said premises and did not hand over the possession of the suit property to the Court Receiver. Consequently on 25.10.1983 the plaintiffs made an application to this Court for forcible possession of the said property and by an order dated 25.10.1983 this Court directed the Court Receiver to take forcible possession of the said Baroda property from whomsoever is found in possession thereof. It is the case of the applicants that pursuant to the said order of

forcible possession, the applicants handed over physical possession of the said properties to the Court Receiver, High Court, Bombay and Receiver was in possession thereafter. In the meantime, it was found that the Receiver's possession was interfered with by the applicants and thus the Court Receiver filed a complaint and consequently a criminal case was instituted being Criminal Case No. 2343 of 1984 in the Court of Judicial Magistrate, Baroda. By an order and judgment dated 23.3.2001, the said complaint was dismissed essentially on the ground that the accused no. 1 who was the father of the applicant and the mother of the respondent no. 1 have already expired and thus it cannot be established that in fact whether he interfered with the possession of the Court Receiver or not. It is the case of the applicants that sometime in or about 2002 when the Court Receiver published an advertisement inviting third parties for offering agency of the Court Receiver in respect of the said property he took out a notice of motion being Notice of Motion No. 438 of 2002 in Testamentary Petition No. 12 of 1983 seeking to applicant him as an agent of the Court Receiver in respect of the said property. The said notice of motion is pending. The said notice of motion was to appoint the applicants as agent of the Court Receiver in respect of the said Baroda property. Though the said motion is pending but practically it has become infructuous

by virtue of the fact that the Court Receiver, High Court, Bombay is already discharged in the said proceedings.

3. It is the case of the applicants that on 15.4.2004 collusive and fraudulent consent terms were filed by the plaintiffs and the defendants in Testamentary Petition No. 12 of 1983 in this Court. It is their further case that the applicants were not given notice of the said consent terms to be filed in the proceedings in spite of the fact that the plaintiffs and the defendants were aware that the applicants are claiming rights in the said property. It is the case of the applicants that under clause 2 of the consent terms, the Court Receiver, High Court, Bombay is discharged and under Clause 4 thereof the Receiver has been asked to give possession of the estate of the deceased Yeshwantrao Ghatge to the defendants. By an order dated 15.4.2004, the said consent terms are taken on record and the said Testamentary Petition is disposed of. It is the case of the applicants that no order has been passed by this Court in terms of the consent terms and thus the consent terms is not superimposed with the impremature by the Court as the order of the Court. It is his further case that similar consent terms which were fraudulent in nature were filed also in Testamentary Petition No. 23 of 1983 and in the said proceedings by an order

dated 15.4.2004 the said consent terms are taken on record. Clauses 1, 2 and 3 of the consent terms inter alia provide for issuance of a probate of the last will and testament of Shalini Devi dated 4.8.1982 and alleged will dated 6.1.1982 has been given up and/or stood revoked. By clause 4 of the said consent terms it is provided that an agreement for sale in respect of Baroda property in favour of respondent nos. 1 and 2 has been reaffirmed and it is provided under clause 4 thereof that the said property will be conveyed in favour of the respondent nos. 1 and 2. By the said order dated 15.4.2004 this Court has directed for issuance of probate of the said Shalini Devi's last will and testament dated 4.8.1982. However, it is the case of the applicants that no orders were passed by this Court in terms of the consent terms and thus the consent terms did not form part of any order of this Court.

4. It is the case of the applicants that subsequent to the passing of the order dated 15.4.2004 and subsequent to the tender of the consent terms on the record of the Court, the defendants fraudulently represented to the Court Receiver that there is an order of the Court directing the Court Receiver to hand over possession of the suit property to the defendants. It is the further case of the applicants that the plaintiffs

have colluded with the defendants in defrauding the Court Receiver and misrepresenting him to hand over possession since there was no order in terms of the consent terms. However, on the basis of the representation made before the Court Receiver, High Court, Bombay, the Court Receiver has handed over the possession to the defendants by a possession receipt dated 21.4.2004 and the defendants have in turn put the respondents in possession of the suit property. It is the case of the applicants that in the aforesaid fraudulent manner the applicants who were in actual and physical possession of the property before the Court Receiver took possession thereof, have been dispossessed which is not in accordance with the due process of law and thus the applicants be restituted the possession thereof.

5. Thus, in the aforesaid circumstances, the present notice of motion is moved by the applicants firstly claiming that the said clause 4 of the consent terms which inter alia provides for handing over possession of the said property by the Court Receiver to the defendants and the defendants to the respondents is nullity and that the same should be set aside. In any event, it has been submitted that the applicants should be restituted by the principle of restitution as covered by the provisions of Section 144 of the CPC and 151 of the CPC and the Court must put the applicants back in possession of

the said property by restitution and restore the situation as existed prior to the date of the Court Receiver took possession of the said property.

6. When I put to Mr. Tulzapurkar, the learned counsel for the applicants that how the motion is maintainable in terms of prayer clause (a) which inter alia provides for setting aside the consent terms as a nullity because the said prayer is not in the nature of inter locutory reliefs but it requires to file a substantive suit, the learned counsel has stated and which I record that he is not pressing prayer clause (a) of the motion. However, in so far as remaining prayers are concerned, it is his case that irrespective of the fact whether he insists on prayer (a) or not, still he is entitled to press the remaining prayers on the principal of restitution.

7. The learned counsel Mr. Tulzapurkar appearing on behalf of the applicants has inter alia contended as under :-

(i). Firstly it is contended that the applicants are entitled to be put back in possession of the said property on the principal of restitution. It is his case that the order of the Court cannot harm or injure any party to the proceedings or prejudice substantive rights of the parties unless it determines finally the dispute between the parties.

It is his case that in the present case the rights of the parties were never determined nor can ever be determined because of the fact that the testamentary jurisdiction does not decide any dispute as to the title of the property and thus he is entitled to the restitution of the said property because the Court Receiver took possession from him and once the Court Receiver is discharged he should be put back in possession unless the Court finally decides the rights in the present case. It has been contended by him that the principal of restitution is based on justice and equity. It has been further contended that the inter-locutary orders are always subject to the final order and in aid of the final reliefs and thus as soon as the dispute is finally determined the interim orders must come to an end. It is his case that in the present case when the testamentary petition was finally determined and a probate was issued, the rights of the applicants and/or of the other parties were not determined and, therefore, he should have been put back in possession of the said property relegating the parties to recover the possession of the property from the applicants by instituting a substantive proceeding and the same could not have been done in a surreptitious and fraudulent manner as has been done by the plaintiffs, defendants and respondents colluding together.

(ii) Secondly it has been contended by the learned counsel for the applicants that by virtue of the fact that the testamentary jurisdiction does not determine any right, title or interest in the property even if the consent terms are treated as orders of the Court still it cannot be considered that it has recognising the rights of the respondents in respect of the agreement for sale which they are claiming to be in their favour of such property and thus the respondents are not entitled to possession of the said property. It is the applicants who are entitled to the possession of the property because the applicants were dispossessed from the premises by use of force by the Court Receiver pursuant to the orders passed by this Court.

iii) Thirdly, it has been contended by applicants that it is now settled law that the possession of an individual cannot be disturbed and/or he cannot be dispossessed from the premises without due process of law. The applicants were in settled possession of the said property in part performance of the said two agreements for sale dated 2.9.1982 and, therefore, the possession of the applicants ought not to have been disturbed. It has ben contended that disturbing the possession of the applicant by utilizing the mode of the Court Receiver and handing over possession thereof to the respondents herein is

without due process of law and thus, the applicants are entitled to be put back in possession of the said property.

iv) Fourthly it has been contended by the learned counsel for the applicants that the plaintiffs and the defendants have played fraud in collusion with each other. It has been contended that there were no orders passed by this Court to hand over possession of the property by the Court Receiver to the defendants and the defendants and the plaintiffs jointly in correspondence with the Court Receiver have made misrepresentation to hand over possession of the said property to the defendants. It has been wrongly represented to the Court Receiver that there exists any such order because there was no order passed in terms of the consent terms and there was no order to hand over possession by the Court Receiver to the defendants. It has been contended that the Court Receiver, High Court, Bombay, ought to have made a report to the Court seeking directions about whom the possession should be handed over once the petition has come to an end rather than believing in the false representation of the plaintiffs and the defendants and handing over the possession thereof to the defendants herein. It has been contended that such an act on the part of the plaintiffs and the defendants is fraudulent act and it amounts to

practising fraud on Court and such party should not be assisted by the Court and the Court must do complete and substantial justice. It has been thus contended that the Court Receiver should be directed to take back possession from the respondents of the said property and hand back the same to the applicants herein.

v) Fifth and the last contention advanced by the learned counsel for the applicants is that the respondents are in unlawful possession of the property and have been wrongfully developing the said property. My attention has been drawn to the various ad-interim orders passed in this proceedings by S.K. Shah J. under which the injunction was continued from time to time and on 2.12.2004 while adjourning the matter till 13.1.2005 the Court has stated that in the meantime the earlier order of ad-interim order granted on 5.8.2004 to continue. It has been brought to my attention that on 13.1.2005 when the matter appeared, the injunction was not continued under the impression that the order dated 2.12.2004 inter alia provides in the meantime the injunction to continue means that the injunction will be continued till the order is set aside and/or the motion is finally heard. It has been thus contended that the plaintiffs, defendants and the respondents have wrongfully contended before the learned Single Judge that the said ad-interim

orders have come to an end on 13.1.2005. It has been brought to my notice that a contempt petition was filed inter alia on the ground that in spite that the ad-interim order being continued from even after 13.1.2005 the construction work has been commenced by the respondents and, therefore, the respondents are guilty of contempt. I am informed that the said contempt petition was heard by the learned Single Judge who has by his order and judgment dismissed the said contempt petition by inter alia holding that the ad-interim order was only upto 13.1.2005 and is not continued thereafter.

8. The learned counsel for the applicants has in support of the aforesaid contentions relied upon various judgments of the Apex Court which I now separately enumerate as under :-

9. In support of his first contention pertaining to the restitution the learned counsel has relied upon the judgement of the Madras High Court in the case of P. Narayana Pillai v. S. Nagamoney, reported in 1970 Madras Law Journal Reports, page 161. Particularly he has relied upon the following portion of the judgment.

> "All that has happened is that the obstruction offered by her client was directed to be removed, that that order was

set aside in appeal and that there was a declaration that the tenant was entitled to remain in possession till the value of the improvements be paid. If, after that, it is the claim of the landholder, or any one claiming under the landholder, that the tenant is liable to be evicted, the duty of the person is to take proper steps, under the law, for such eviction. Our order appointing that party as a receiver, cannot be taken advantage of, to prevent the redelivery of the property, to the person from whom the receiver took delivery, on any pretext, for that would precisely offend the principle stated by Cairns, L.C. above, viz., an injury to one of the suitors would be committed indirectly, as a consequence of an interlocutory order of the Court. Hence, we have no hesitation, whatever, in holding that, whatever else might be the rights inter se between the parties, our receiver must hand over the possession which he obtained from the appellant, by virtue of our orders, back to the party who parted with that possession and then pursue his remedies at law, whether by way of further execution of any decree already in existence, or by way of the institution of a fresh suit, as advised."

He has thereafter relied upon the judgment of the Apex Court in the case of Mrs. Kavita Trehan and another v. Balsara Hygiene Products Ltd., reported in AIR 1995 SC 441 and particularly paragraphs 13, 14 and 15 thereof which read as under :-

> "13. The Law of Restitution encompasses all claims founded upon the principle of unjust enrichment, 'Restitutionary claims are to be found in equity as well as at law'. Restitutionary law has many branches. The law of quasi-contract is "that part of restitution which stems from the common indebitatus counts for money had and received and for money paid, and from quantum meruit and quantum valebat claims." (See 'The Law of Restitution' - Goff & Jones, 4th Edn. Page 3). Halsbury's Law of England, 4th Edn. Page 434 states :
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> "Common Law, any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi contract or restitution.
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> For historical reasons, quasi contract has

traditionally been treated as part of, or together with, the law of contract. Yet independently, equity has also developed principles which are aimed at providing a remedy for unjustifiable enrichment. It may be that today these two strands are in the process of being woven into a single topic in the law, which may be termed "restitution"."

Recently the House of Lords had occasion to examine some of these principles in Woolwich Equitable Building Society v. Inland Revenue Commissioners, 993 AC 70.

"14. In regard to the law of restoration of loss or damage caused pursuant to judicial orders, the Privy Council in Alexander Rodger Charles Carnie v. The Comptoir D'Escompte De Paris, (1869-71) 3 AC 465 at 475 stated:

"....one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors, and when the expression "the act of the Court" is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case."

In Jai Berham v. Kedar Nath Marwari, AIR 1922 PC 269 at 271, the Judicial Committee referring to the above passage with approval added :

"It is the duty of the Court under S. 144 of the Civil Procedure Code to "place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or

reversed."

Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the court to act rightly and fairly according to the circumstances towards all parties involved."

In Binayak Swain v. Ramesh Chandra Pahigraph, (1966) 3 SCR 24 at 27: (AIR 1966 SC 948 at p. 950), this Court stated the principle thus:

"..... The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has ben done under the erroneous decree; and the Court in making restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the Court by its erroneous action had displaced them from ....."

"15. Section 144, C.P.C. incorporates only a part of the general law of restitution. It is not exhaustive. (See Gangadhar v. Raghubar Dayal, AIR 1975 All 102 (FB) and State of Andhra Pradesh v. M/s. Manickchand Jeevraj & Co., Bombay, AIR 1973

Andh Pra. 27).

The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of S. 144, Section 144 opens with the words "where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose....". The instant case may not strictly fall within the terms of S. 144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court.

We have considered this submission of Sri Grover relying on Sakamma v. Eregowda, (1974) 2 Kant LJ 357, that the mere fact that the suit for permanent injunction was dismissed resulting in the vacation of the interim order of injunction granted during its pendency, would not entitle the successful defendant to seek restitution under S. 144, C.P.C. That principle has no application in this case. In the case

before us the injunction granted by the learned Senior Sub-Judge, Chandigarh, was not merely negative in terms interdicting interference from the respondent with the custody of the goods by the appellants; it went much further and expressly enabled the appellants to sell the goods. Pursuant to this order, the appellants disturbed the status quo as on the date of the suit and sold away respondent's goods and converted them into money. The High Court while declining the prayer for payment of the sale proceeds to the respondent, however, sought to relegate the parties to the extent practicable, to the same position as obtained on the date of the suit. This the High Court did by directing furnishment of security to the extent of the value of the goods sold away under the cover of the interlocutory order. That an appeal filed against the said interlocutory order was withdrawn, does not, in our opinion, make any difference. Upon dismissal of the suit, the interlocutory order stood set aside and that whatever was done to upset the status quo, was required to be undone to the extent possible. It is unfortunate that the learned Sub-Judge, 1st Class made an order which, we think, ought not to have been

made. If the Trial Judge felt that it was in the interest of justice that the goods required to be disposed of, he should have ordered the sale by or under the supervision of a Commissioner of the court ensuring that the sale proceeds were under the court's control. We are constrained to observe that the order of the learned Sub-Judge, Ist Class, failed to have due regard to the need to protect the interests of the opposite party and, to say the least, an improper order was passed. The ex parte order granted by the learned Sub-Judge, Ist Class, was not of mere negative import but virtually enabled and authorised the appellants to sell away respondent's goods of which appellants were mere clearing and forwarding agents. This permission to sell implicit in the form of the order enabled the appellants to purport to convey, respecting the goods, a better title than what appellants themselves had. That such a thing was achieved by an ex parte order, tends to shake litigants' faith in the judicial process. The learned Sub-Judge, Ist Class ought not to have made an ex parte order which occasioned serious prejudice and loss to the respondent. On the administrative side, the High Court may have

to look into the propriety of the conduct of the learned Sub-Judge, Ist Class, in this case.

10. The learned counsel for the applicants has thereafter relied upon the judgment of the Apex Court in the case of Shipping Corporation of India vs. Machado Brothers and others, reported in 2004 AIR SCW 1842 and in particular he has relied upon the following paragraph.

> "27. While dismissing the application I.A. No. 20651/2001 the Courts below proceeded not on the basis that the original notice of termination has not become infructous, but on the basis that the said application lacks in bona fide and if the said application is allowed the interlocutory injunction hitherto enjoyed by the plaintiff will get vacated and consequently the plaintiff will be prejudiced. The question for our consideration now is whether such ground can be considered as valid and legal. While so considering the said question one basic principle that should be borne in mind is that interlocutory orders are made in aid of final orders and not vice versa. No interlocutory order will survive after the original proceeding comes to an end. This

is a well established principle in law as could be seen from the judgment of this Court in Kavita Trehan (Mrs.) and another v. Balsara Hygiene Products Ltd., (1994 (5) SCC 380), wherein it is held :

> "Upon dismissal of the suit, the interlocutory order stood set aside and that whatever was done to upset the status quo, was required to be undone to the extent possible."

11. In support of his contention that the person cannot be dispossessed without due process of law, the learned counsel has relied upon a well known judgment of the Apex Court in the case of Krishna Ram Mahale (dead) by his LRs., vs. Mrs. Shobha Venkat Rao, reported in AIR 1989 SC 2097, particularly paragraph 9 of the judgment which reads as under :-

> "9. This proposition was also accepted by a Division Bench of this Court in Ram Rattan v. State of Uttar Pradesh (1977) 2 SCR 232 : (AIR 1977 SC 619). The Division Bench comprising of three learned Judges held that a true owner has every right to dispossess or throw out a trespasser while he is in the act or process of trespassing but this right is not available to the true owner if the

trespasser has been successful in accomplishing his possession to the knowledge of the true owner. In such circumstances, the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies under the law. In the present case, we may point out that there was no question of the plaintiff entering upon the premises as a trespasser at all, as she had entered into the possession of the restaurant business and the premises where it was conducted as a licensee and in due course of law. Thus, defendant No. 3 was not entitled to dispossess the plaintiff unlawfully and behind her back as has been done by him in the present case. It was pointed out by Mr. Tarkunde that some of the observations referred to above were in connection with a suit filed under S. 6 of the Specific Relief Act, 1963 or analogous provisions in the earlier Specific Relief Act, 1877. To our mind, this makes no difference in this cases as the suit has been filed only a few weeks of the plaintiff being unlawfully deprived of possession of the said business and the premises and much before the period of six months expired. In view of the aforesaid conclusions arrived at by us, we

> do not propose to consider the question whether the agreement between the plaintiff and defendant No. 3 amounted to a licence or a sub-lease."

12. In support of his contention that the plaintiffs, defendants and the respondents in collusion have committed fraud and thus the entire order on the basis of which the possession is taken is vitiated and, therefore, this Court should not assist such party in retaining the possession and must direct the possession handed back to the applicants herein. The learned counsel has relied upon the judgment of the Apex Court in the case of Ramchandra Singh vs. Savitri Devi and others, reported in (2003) 8 SCC 319, particularly paragraphs 23, 28, 33 and 35 of the said judgement which reads as under :-

> "23. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to derive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous."
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> 28, In Indian Bank v. Satyam Fibres (India (P) Ltd. this Court after referring to Lazarus Estates and other cases observed

that since fraud affects the solemnity, regularity and orderliness of the proceedings of the court it also amounts to an abuse of the process of the court, that the courts have inherent power to set aside an order obtained by practising fraud upon the court, and that where the court is misled by a party or the court itself commits a mistake which prejudices a party, the court has the inherent power to recall its order (SCC p. 563, para 23). It was further held: (SCC pp.562-63, para 22)

> "22. The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the court's business."

"33. Once it is held that a judgment and decree has been obtained by practising fraud on the court, it is trite that the

principles of res judicata shall not apply. The High Court, therefore, in our opinion committed a serious error in referring to the earlier orders passed by it so as to shut the doors of justice on the face of the appellant for all times to come. We, therefore, are of the opinion that the impugned judgment dated 10-12-1998 cannot be sustained."

"35. The consent order, as is well known, is an agreement between the parties with the seal of the court superadded to it. The appellant herein in the review application categorically stated that the parties to the appeal had suppressed the auction-sale as also the confirmation thereof. The effect of the events appearing subsequent to the filing of the first appeal resulting in creation of a third-party right was bound to be taken into consideration by the High Court. A third-party right cannot be set at naught by consent. The High Court, therefore, was required to consider the contention of the appellant in its proper perspective. The High Court, in our opinion, was obligated to address itself on these questions for the purpose of reviewing its order."

13. On the other hand, the learned counsel for the plaintiffs has contended that the applicants are entitled to no relief of any nature whatsoever for various reasons. Firstly, it has been contended that the applicants were never put in possession pursuant to the said so-called two agreements dated 2.9.1982 but in fact the applicants have broke open the lock on the premises and forcibly entered into the possession after the orders passed by this Court of appointment of the Court Receiver. It has been also contended that the applicants have no right, whatsoever of claiming possession of the said property because they have failed in three suits filed by them before the Gujarat Courts right upto the High Court and thus having failed in their own substantive proceedings, are now seeking to obtain possession in the summary manner by way of this notice of motion which this Court should not entertain. It has been alternatively contended that in fact the applicants are seeking to reverse the orders which are passed against them by the Gujarat Courts by way of this notice of motion because the Gujarat Courts have refused to put them back into the possession of the said property and to protect their possession on the basis of their so called two agreements for sale and thus this Court should not interfere with the said judicial orders of the Court of competent jurisdiction and which are upheld right

upto the High Court. It has been further contended that the relief of restitution cannot be granted to the applicants herein because the applicants are indulging in fraudulent activities and the Courts at Gujrat in their own proceedings have time and again held that the applicants are practising fraud on the Court and are indulging in abuse of the process of law and, therefore, their applications are rejected by the Gujarat Courts. A person having been certified prima facie by the courts of a nature who commits abuse of the process of the Court cannot claim in this equitable jurisdiction restitution of the possession because the principle of restitution is based on justice, good conscience and equity. A person seeking equity must do equity. A person who has committed fraud on Courts is not entitled for such relief in equity and, therefore, his motion must be dismissed.

14. The learned counsel has further contended that the applicant no. 1's father and applicant no.2's husband who was a constituted attorney at the relevant time was a party to the notice of motion No. 783 of 1983 in this testamentary proceedings. He has been dispossessed according to the applicants themselves by orders passed by this Court in the said Notice of Motion. The applicants were thus aware of their dispossession as far back as 1983 when for forcible possession orders were passed and

possession was taken. The applicants have chosen to be quite and not moved this Court from 1983 to 2002 and even in 2002 made an application that they should be appointed as agent of the Court Receiver and never sought possession back from the Court Receiver right upto 2004 now at this stage they are not entitled to seek any such relief. In any event, it has been submitted that it is an admitted position that the possession of the said premises was not handed over by the applicants to the Court Receiver but it is Kantibhai, father of the 1st applicant and the husband of the 2nd applicant who handed over possession thereof. It is also an admitted position that the said Kantibhai has already expired and thus there can be no restitution to such a person and thus no relief should be granted.

15. The learned counsel has thereafter contended that it is no doubt true that there is a principle of restitution but the principle of restitution cannot be blindly applied to each and every facts of the case but it has to be applied by taking into consideration the events and circumstances which have transpired in the case. In the present case, the learned counsel for the plaintiff submits that serious events have transpired particularly in the nature of substantive proceedings initiated by the applicants themselves in the courts of competent

jurisdiction and thus, the said events cannot be ignored by this Court while granting relief on the principle of restitution. Once a party having failed in substantive proceedings initiated by him it is not open to him to seek the possession by way of restitution which he could not get in his own proceedings which were initiated by him. It is thus submitted that the principle of restitution cannot be stretched to unimaginable height meaning thereby that the Court cannot be blind to the events which have occurred in interregnum and the restitution can only be granted if the case is made out on the basis of the situation prevailing by taking into consideration subsequent events which have transpired.

16. Lastly it has been contended that the applicants who are shouting around about the fraud committed by the plaintiffs have in fact committed fraud on this Court by suppressing the material facts of filing of a suit in a Gujarat Court being Suit No. 861 of 1982 and the orders passed therein. The said suit was filed according to the plaintiff for the specific performance of the said two agreements for sale dated 2.9.1982 executed by the defendants in their favour. The said suit is the most material part of the present proceedings which has been deliberately suppressed by the applicants before this Court as there is no mentioned in the

affidavit in support or in the rejoinder to the present proceeding and thus a person making noise of fraud is himself a fraudulent person and thus such a plea from such a person ought not to be entertained by this Court. Thus, it is submitted by the learned counsel for the plaintiffs that the applicants have made out no case whatsoever to grant any relief in the present proceedings and the notice of motion therefore ought to be rejected.

17. The Mr. Bookwala, learned counsel appearing for the defendants has brought to my notice the two agreements for sale dated 2.9.1982 which were produced by the applicants pursuant to notice of production given by the defendants. It has been brought to my notice that the original agreement is executed only by defendant no. 1 and it has not been executed by defendant no. 1 in his capacity as a constituted attorney of the 2nd defendant. It is only one extension of time which has been executed by the defendant no. 1 both in his personal capacity and/or the capacity of a constituted attorney of the 2nd defendant. Thus, it has been submitted that there is no valid agreement for sale by and between the defendants and the applicants and the so called contention raised that he is put in possession of the said property is false. It has been contended that in fact the applicants were never put in possession pursuant to the so called

agreements for sale but in the circumstances set out in the proceedings in the Bombay Court, the applicants have dispossessed the plaintiffs and broke open the lock and entered the premises just after passing of the order of the Court Receiver in notice of motion No. 783 of 1983. Consequently it has been submitted that the Court directed forcible possession of the property from the applicants herein. It has been thus submitted that the person who takes law in his own hands and dispossess a person in possession is neither entitled to invoke the principles of restitution based on equity nor is entitled to claim the principle of settled possession and not to be dispossessed without due process of law. A person who commits the act of such nature in fact is not entitled to any assistance from this Court and, therefore, his notice of motion must be rejected.

18. Mr. Nitin Thakkar, the learned counsel appearing for the respondents has also contended that the applicants are not entitled to any relief whatsoever. It has been contended that the agreements for sale on the basis of which the so called motion has been founded is ex-facie bogus and false. It has been brought to my notice that the stamp office of the State of Gujarat has pointed out that the stamp which has been used for the purpose of execution of the said agreements has been

obtained fraudulently but it has been deliberately back dated and a false entry khatas has been entered in the stamp register on which the so called two agreements for sale dated 2.9.1982 have been claimed to have been executed by the defendants in favour of the applicants. It has been brought to my notice that both the stamp papers contained the same number which is impossible and it ex-facie indicates that the documents are fabricated and fraudulently prepared subsequent to the appointment of the Court Receiver merely so as to claim the right, title and interest in respect of the suit property. It has been further contended by the learned counsel appearing for the respondent that he is the bonafide purchaser without notice of any such claim of the applicants and he has been lawfully continues to be in possession of the property consequent to their agreements being vitiated. He has also pointed out that subsequent to the putting them in possession the respondents have spent large amounts of money towards the construction, levelling, obtaining permissions. Thus, the equity demands that the respondents possession ought not to be disturbed and they should not be directed to hand over possession back to the applicants. These arguments are advanced by the learned counsel for the respondents over and above the arguments which are advanced by the plaintiffs and the defendants and which are supported by the respondents herein.

19. On the aforesaid contentions of the parties, the learned counsel Mr. Tulzapurkar has submitted that it is irrelevant whether there is a valid agreement for sale or not in their favour. It has been submitted that once the Court Receiver has taken possession from the applicants then the applicants are alone entitled to be put back in possession of the suit property. It has been further submitted that the Court cannot take into consideration the events which have transpired in various Courts and deny the restitution of the property to the applicants herein in this proceedings. It is because this Court is not concerned with what has transpired in such substantive proceedings. It has been submitted that the said orders on which reliance has been placed by the plaintiffs, defendants and the respondents are only interlocutory orders and all the three suits are still pending in the various courts and thus no relief can be denied by taking into consideration such interlocutory proceedings. However, on being confronted Mr. Tulzapurkar admitted that the first two suits being RCA Suit No. 148 of 1983 and RCA Suit No. 861 of 1984 are no more pending in the said Courts because the first suit being Suit No. , 143 of 1983 filed before the Civil Judge, Senior Division, Kheda at Nadiad stands withdrawn by the applicants and RC Sit No. 861 of 1984 has been

dismissed for default by the said Court of Civil Judge, Senior Division, Vadodara. In view thereof, there is only one suit pending namely, RC Suit No. 2377 of 1995 before the Civil Judge, Senior Division, Baroda. However, the learned counsel has vehemently contended that despite all these intervening circumstances he is entitled to be put back in possession of the said property on the principle of restitution.

20. Now firstly dealing with the submissions of the learned counsel for the applicants that the applicants are entitled to the restitution of the said property, I am of the opinion that the principle of restitution has to be applied on the basis of the facts and circumstances of each case. Undoubtedly, the orders of the Court cannot harm any party and cannot affect the interest of any party in any proceedings. However, the Court cannot be oblivious to the events which have transpired between the time when the orders are passed and the time at which restitution is sought. If the parties rights are substantially considered in substantive proceedings then in my opinion the principle of restitution cannot be stretched to such an extent that the orders which are passed in substantive jurisdiction of the court can be defeated and/or overturned in the manner as sought by the learned counsel for the applicants herein. In the present

proceedings three suits are filed by the applicants before various courts in Gujrat which are briefly enumerated hereinunder along with the orders passed therein. The first suit being Special Civil Suit No. 143 of 1983 was filed before the applicants were dispossessed by the orders of the court. In the said proceedings it was pointed out that the said suit was filed on 11.7.1983 i.e. prior to his dispossession. The suit was filed in Nadiad Court though the said property of which possession is sought to be protected is at Baroda. The prayers in the said suit was to declare the plaintiffs have rights, title and interest in the said property and hold that the plaintiffs are in independent possession of the said property as described in the Schedule and they are entitled to continue to be in possession in accordance with the agreements for sale. A permanent injunction was also sought that the plaintiffs possession should not be disturbed. The said suit has been admittedly withdrawn on 14.9.1984 i.e. subsequent to the possession taken over by the Court Receiver. The appointment of the Court Receiver was made on 19.9.1983. On 25.10.1983, the forcible possession order was passed and the possession was taken by the Court Receiver by force sometime in or about February 1984. After loosing the possession in respect of the said property instead of proceeding further with the said suit, the applicants have withdrawn the said suit on

14.9.1984.

21. In Notice of Motion No. 786 of 1983 the father of the applicant no. 1 and husband of the applicant no. 3, was impleaded as a party respondent no. 3. The affidavit in support which is filed to the notice of motion indicates that on 25.8.1982 the plaintiffs were put in possession of the suit property at Baroda. A receipt has been executed on 25.8.1982 to which the defendant no. 1 is a party and signatory thereto. Thus, the said defendant has put the plaintiff in possession of the suit property on 25.8.1982. The plaintiffs were therefore in possession as on the date of agreement for sale executed by the defendants on 2.9.1982 and the defendants were not in possession of the suit property and therefore, the question of handing over possession to the applicants by the defendants could not arise. The receipt is annexed as Exhibit "C" to the said notice of motion No. 786 of 1983. However, it seems that on 24.3.1983 the plaintiffs were informed that taking advantage of the absence of the watchmen Mr. Narayanbhai and/or Mr. Pujari, Mr. Vyas who were employed by the plaintiffs to look after the Guruniwas the father of the applicant no. 1 and the husband of applicant no. 2 broke open the locks put on the main gate of Guruniwas property and also broke open other locks of the main bungalow premises and put his own lock.

22. In support of the aforesaid contention the plaintiffs have relied upon the detailed inventory and verification which was carried out while taking over possession to the plaintiffs. On the basis of the aforesaid averments, the said application was made being Notice of Motion No. 786 of 1983 in this Court. To the said application said Kanti Patel was a party. Though it is the case of the applicants that the said Kanti Patel was not given notice of hearing of the said notice of motion but the fact remains that the said proceedings culminated ultimately in an order passed of his dispossession from the said properties by virtue of appointment of the Court Receiver on 19.9.1983. It is pursuant thereto that an order of forcible possession was also passed on 25.10.1983 and admittedly the possession has been taken from the said Kanti Patel by the Court Receiver in February, 1984. Mr. Kanti Patel did not move any application and disputed any of the allegations which were made in the affidavit in support of the motion in which it has been inter alia alleged that Kanti Patel has broke open the premises of Baroda property and has entered into possession thereof. All these facts were brought to the notice of the learned Civil Judge, Senior Division Nadiad in Special Civil Suit No. 143 of 1983 and thus by an order dated 26.7.1983, the learned Judge modified the earlier blanket order of

injunction and permitted the plaintiffs herein to proceed further with the proceedings being Notice of Motion No. 786 of 1983. Ultimately, on 14.9.1984, the said suit has been withdrawn by the applicants.

23. On the aforesaid evidence which is on record of the present proceedings particularly Notice of Motion No. 786 of 1983, it is very difficult for me to accept the contention of the learned counsel for the applicants that they were put in possession of the suit property in part performance of the so called two agreements dated 2.9.1982. I am of the prima facie opinion that the defendants were not in possession of the suit property as on 2.9.1982 to put the applicants in possession of the suit property pursuant to the agreements for sale purported to have been executed by the defendant no. 1 and 2. I am also of the prima facie opinion that the applicants have forcibly entered into possession of the said premises and have disturbed the possession of the plaintiffs and as such, I am of the opinion that such person cannot be put back in possession of the property merely on the principles of restitution. It is well settled that the principal of restitution is based on equity and justice and person who seeks equity and justice must do equity and justice and cannot claim restitution by entering into possession of the property by breaking open the locks.

24. The matter never rested there. The plaintiffs thereafter filed a suit being Regular Civil Suit No. 861 of 1984. The said suit was filed before the Civil Judge, Senior Division, Vadodara. The said suit has been filed by the plaintiffs who are the applicants herein and the same is titled as suit for declaration and permanent injunction. In the said suit the plaintiffs have prayed that the defendants have no right to obstruct or disturb the plaintiffs possession of the suit property. It has been further claimed that permanent injunction should be granted restraining the defendants from obstructing possession through the Court Receiver or through police force. In the said suit, an ex parte order of injunction was obtained on 20.6.2004. The matter was thereafter heard and the learned Judge while hearing the said application has given his finding as under :-

> "21. It is not in dispute that before the suit out of which the present appeal has come to be filed, the plaintiff had filed a special suit in the court of the Civil Judge (S.D.) Nadiad and had obtained an exparte - ad-interim injunction. It is also not controverted that the exparte ad-interim injunction that was granted in the said

suit, was ultimately modified. It was thereafter that the suit was unconditionally withdrawn. It may be of significance to note that even this fact is not stated in the suit out of which the present appeal arises as also in the application ex.5 before the trial court. To my mind in view of suit, filed also on the same cause of action, there is considerable force in the contention on behalf of the defendants that the suit as brought is not maintainable. That is one ground not to grant the stay as prayed for.

"22. It is inconceivable that the plaintiffs did not know of the proceedings before the Bombay High Court. Be it noted that none other than the husband of plaintiff No. 1 and the father of plaintiff No. 2 was a party in the said proceeding and yet as is uncontroverted before me, said Shri Katilal Patel has not brought to the notice of Bombay High Court the fact that he has as power of attorney holder of Shri Rajendrasinh executed an agreement for sale in favour of the plaintiffs.

"23. Apart from that there is no data on record to show that Shri Rajendrasinh had as

the heir of said Shrimant and Shrimati Ghadge inherited the property. As I am told said Shrimati Ghadage was the maternal aunt of said Shri Rajendrasinh and even said Rajendrasinh has his brother. It is difficult to accept that the property would devolve upon said Shri Rajendrasinh giving him any right as he purpors to have done under the agreement of sale executed by said Kantilal Patel and if that is so, then even assuming that some such agreement for sale was executed the plaintiffs acquire no interest at all in the said property.

"25. Even long before that after the death ceremony of the deceased Smt. Ghadage being performed said Rajendrasinh had handed over the possession of the suit property to the defendants on 25-8-1983. There was an attempt to dispossess the defendants and that is how on 29-4-1982 an exparte ad-interim injunction was obtained against said Rajendrasinh, Jyotsanadevi and Kantilal Patel restraining them from dealing with or disposing the suit property.

"27. Since 19-12-1983 the court receiver has been in possession of the suit property on the strength of the order of the Bombay

> High Court. The plaintiffs no doubt obtained an exparte ad-interim injunction from Nadiad court, suppressing all the material facts. However in the ultimate, the said suit has been withdrawn unconditionally and it was thereafter that on 12-6-84 the suit out of which the present appeal arises came to be filed. In that view, the plaintiffs cannot be said to be in settled possession and possession having in legal.
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> "28. On the other hand, as would appear from the order of the learned trial Judge the record reveals that the plaintiffs have committed gross abuse of the process of law and in that event no discretionary order as prayed for by them may be granted."

25. The aforesaid findings of the learned trial Judge in a substantive proceedings adopted by the plaintiffs leaves no manner of doubt that the plaintiffs have come into possession in surreptitious manner by breaking open the lock. That, there is an agreement which has been purported to have been propagated by the plaintiffs which is bogus and that the plaintiff is in the habit of suppressing the material record from the court and is indulging in an abuse of the process of law.

Against the said order of the Civil Judge, Senior Division, the appellants preferred an appeal being Special Civil Application in the High Court of Gujarat at Ahmedabad. The applicant has failed to obtain any relief in the said special civil application. However, it has been brought to my notice by the learned counsel for the plaintiffs that by an order dated 19.4.1994, the suit has been dismissed for default. Thus, the suit never went for trial at all.

26. The applicants thereafter continued to pursue their proceedings before the Civil Judge at Baroda now by filing a third suit being Suit No. 2377 of 1995. The said suit is titled as Regular Civil Suit No. 2377 of 1995 and suit is for declaration and specific performance of the said so-called two agreements dated 2.9.1982. The suit recites as under :

"Sub- Suit for declaration and for
specific performance
valued at Rs. 300/-"

The applicants have moved the Court on the basis that there is an agreement for sale in their favour for sale consideration of Rs. 16,50,000/- and that the defendant nos. 1 and 2 have executed the said agreement. In the said suit it has been prayed that

a permanent injunction should be granted against the defendant nos. 1 and 2 and defendant no. 3 who was Court Receiver, High Court was impleaded as the Receiver to the said suit. The prayers proceeded on the footing that the plaintiffs being in possession of the property, the defendant nos. 1, 2 and 3 should be restrained from trespassing or entering upon the suit land or utilising the said land in any manner or creating any third party rights in respect thereof. By prayer (b) it was claimed that orders should be passed to produce all the papers of probate proceedings by the Court Receiver. The said suit has been admittedly filed on 6.12.1995 when in fact the Receiver has been in possession of the property right from February, 1984. Inspite of the aforesaid position, the said suit has been filed by the applicants. Not only that, in the said suit an application was made for interim orders but an interim order was also passed on 15.7.1996. In the said order, the learned Judge has observed as under :-

> "It appears from the records that prior to this suit the pltffs. have filed Civil Suit in the Civil Court of Nadiad which was unconditionally withdrawn by the pltffs., thereafter the plfts have filed Civil Suit No. 861/84 in the Civil Court of Vadodara and exparte injunction was vacated by the

> Court and the said order was challenged by the pltffs. by filing Civil Misc. Appeal No. 376/84 in the Appellate Court of Vadodara and that appeal was also dismissed on the same day, thereafter the pltffs. have filed the Civil Revision Appln. No. 1556/84 in the Hon'ble High Court of Gujarat at Ahmedabad which was rejected by the Hon'ble High Court of Gujarat on 18/19.10.84 it shows that the pltffs. have not succeeded in the previous proceedings, therefore, the present suit of the pltffs, is nothing but abuse of process of law."

Again the learned Judge has observed as under :-

> "It appears from the records that the suit filed by the pltffs. is nothing but an abuse of process of the Court and fraud, and the subject matter of all the above suits, appeals, revisions and the present suit and the cause of action and the documentary evidence produced are all one and the same, therefore, present application for ad-interim injunction filed by the pltffs. deserves to be dismissed."

On the aforesaid basis the injunction application was dismissed by the learned judge. Thereafter the

applicants made further applications in the said proceedings and by a further order dated 7.5.2004, the applications for injunctions have been rejected. This application was moved on the basis that the Court Receiver, High court, Bombay has issued some public notice and the Receiver is likely to hand over possession of the property to the third party. However, the learned Judge after detailed hearing rejected the said applications of the applicants. The applicants thereafter moved the Gujarat High Court by filing a Special Civil Application and I am informed that the said Civil Application being No. 1722/04 has been dismissed. However, the hearing of the suit has been expedited.

27. Thus, these are the events which have transpired inter se from 1984 when the applicants possession has been forcibly taken by the Court Receiver pursuant to the orders passed by this Court. The events who have transpired indicates that the applicants instituted their own substantive proceedings not once but three suits and applied for reliefs from time and again but have not been successful in obtaining any relief at all against the parties herein or against the Court Receiver. It also reveals that the Court passed an order of forcible possession in Notice of Motion No. 786 of 198.. after satisfying prima facie that the father of the applicant no. 1 and the husband of applicant

no. 2 who was a power of attorney holder has taken law into his own hand and has dispossessed the plaintiffs who were in possession of the property. There were clear averments to the above effect in the affidavit in support of the notice of motion. Though the said order of forcible possession was passed in the said motion and implemented, still the respondent no. 3 therein who was the father and the husband of the applicants herein and at all point of time power of attorney holder did not move the Court at all for variation or modification of the orders passed by this Court though he was aware of the order as far back as in 1984. The argument of the learned counsel for the applicants that the property was safe and secure in the hands of the Receiver till the court Receiver was discharged is, in my opinion without any merits and without any substance. If the orders of this Court have affected the rights of the applicants and when their power of attorney holder was party to the said proceedings and further that he was aware of the fact that such orders were passed and implemented and still he remains silent and did not apply for modification or vacating of the said orders then it is not open for such a person to seek restitution after expiry of the period of 21 years and that also after instituting his own substantial proceedings and failing to get any relief therein. In the light of the aforesaid facts, I am of the opinion, that

the principle of restitution presupposes that the Court while passing the order of restitution must take into consideration intervening events and circumstances which have transpired in the matter. I cannot be oblivious of the various proceedings instituted by the applicants in the Courts at Gujarat and the various orders passed therein. Equally I cannot be oblivious of the fact that in spite of the averments in the affidavit in support of the motion that the husband and the father of the applicants have taken forcible possession from the plaintiffs and consequently the Receiver having dispossessed under the orders of this Court, has not moved an application for the entire period of 21 years. Thus, I am not inclined to pass any order of restitution in the present case. The principle of restitution, in my opinion, cannot be stretched to an unimaginable height resulting in an absurd consequence of putting back the applicants in possession of the property who have failed to obtain orders in its own substantive proceedings after being dispossessed. It also cannot be taken to such an absurd consequence that the person who has taken law in his own hand and broke open the lock should be put back in possession of the property. I am unable to accept the contention of the learned counsel Mr. Tulzapurkar that the possession should be handed over to the applicants since the Receiver took possession thereof from them. I am not

inclined to accept the aforesaid submissions because the principle of restitution is based on equity and justice and a person who has taken law into his own hands and it is so prima facie held by the court of competent jurisdiction cannot seek relief of restitution on the principle of equity and justice. In view thereof, I am rejecting the various contentions advanced by the learned counsel for the applicants for the claim of restitution.

28. Looking from the other angle of the matter also, I am not inclined to grant any relief of restitution to the applicants herein. It is now well settled that the principle of restitution cannot be blindly applied. In the judgment of the Apex Court in the case of Pasupuleti Venkateswarlu vs. The Motor & General Traders reported in (1975) 1 SCC 770 the Apex Court has held that the principle of restitution is based on equity and on the principle of justice. Apart therefrom even the aforesaid judgments cited by the learned counsel for the applicants i.e. the case of Mrs. Kavita Trehan and another vs. Balsara Hygience Products Ltd., (supra) and Shipping Corporation of India, Ltd., vs. Machado Brothers and others (supra) both lay down a principle of law that while granting restitution the Court must take into consideration the intervening circumstances and the events and cannot grant relief ignoring the said facts. It has been also held by

the Apex Court in the aforesaid judgments if by passage of time, the relief of restitution becomes superfluous and injurious then in that event such a relief cannot be granted to such a party. In the present case, in my opinion, such a relief has become superfluous and/or injuries in view of the substantive proceedings initiated by the applicants themselves and having failed to obtain any orders therein. Apart from the aforesaid facts, looking from the angle that the principle of restitution is based on the principle of justice, equity and good conscience, in my opinion, the applicants are not entitled to any relief firstly because prima facie the Courts at Gujarat has given a finding that the applicants were never in possession of the property as on 2.9.1982 and further prima facie held the defendant could not put him in possession as on that date. Secondly, prima facie findings are given that the applicant is in habit of suppressing the material facts from the Court and is indulging in total abuse of process of law. The conduct of the applicants in filing suits after suits before Gujarat Courts and the withdrawal of the one suit and dismissal of the second suit for default and still filing the third suit before the Gujarat Court indicates that the applicant has been indulging in a total abuse of the process of law. Such a person, in my opinion, is not entitled to any relief based on the principle of equity, justice and good

conscience. I am also of the further opinion that the applicants have also suppressed the material facts in the present proceedings before me being Notice of Motion No. 2002 of 2004 and the filing of Regular Civil Suit No. 861 of 1984 before the Civil Judge, Senior Division, Vadodara and the orders passed therein. He has also not disclosed the fact that the said orders passed in the said suits were carried right upto the High Court and he has been unsuccessful in obtaining relief. The said suit pertained to the suit property and also pertained to his possession and, therefore, in my opinion, it was a material fact which ought to have been disclosed in the present suit which the applicant has not done. Thus, even after being certified by the court of competent jurisdiction that he is guilty of suppression and abuse of process of law still in the present proceedings where he is seeking equity by seeking reliefs of restitution has still suppressed material facts in the present case. In my opinion, therefore, he is not entitled to any relief of restitution as prayed in the present proceedings.

29. Looking from yet another angle in the present proceedings, I am of the opinion that once the learned counsel for the applicants has given up prayer clause (a), the rest of the reliefs sought for in the present notice of motion cannot be

granted. It is because under clause 4 the respondents are already put in possession of the said property. Unless the said clause 4 is set aside and the respondents possession is taken back and thereafter only the applicants can be put back in possession of the said property. Even if the principle of restitution has to be applied, still, the said relief in terms of prayer clause (a) of the Notice of Motion is necessary. However, the applicants have not pressed the said prayer (a) of the motion and thus, in my opinion not entitled to any other reliefs.

30. The learned counsel for the defendants and the respondents have rightly contended before me that in view of the intervening situation, the applicants are not entitled to any relief. They have drawn my attention to both the judgments in the case of Mrs. Kavita Trehan and another vs. Balsara Hygiene Products Ltd., (supra) and Shipping Corporation of India vs. Machado Brothers and others (supra) and have contended that the Court has to consider the events which have transpired subsequent to the passing of the order of which restitution is sought by the applicants herein. It has also been brought to my notice that in fact the applicants have assigned their rights, title and interest to one Mr. Porwal and Mr. Porval had moved this Court by filing an application for almost

similar reliefs and in which the learned Single Judge of this Court has clarified that by way of the testamentary proceedings substantive rights of the parties are not determined. However, no other reliefs were granted. In view thereof also, I am of the opinion that the applicants and the said Mr. Porwal having similar rights and after Porwal having failed to obtain any orders from this Court the applicants cannot insist on the relief in the present notice of motion and as such, also he is not entitled to any relief.

31. In the circumstances aforesaid, the applicants are not entitled to any relief. Thus, the notice of motion is dismissed. Applicants to pay cost of the present notice of motion quantified at Rs. 10,000/- each to the plaintiffs, defendants and the respondents.

32. In so far as Notice of Motion No. 438 of 2002 is concerned all the parties before me agree that in view of discharge of Court Receiver the same has become infructuous and thus I dismiss the same as infructuous.

33. Mr. Tulzapurkar, the learned counsel for the applicants has thereafter contended that in any event, this Court should pass an order of injunction and interim relief which was operating as ad-interim

till 13.1.2005. He has contended that such interim relief granted earlier and has come to an end on 13.1.2005 should be restored till the applicants move the appellate court against this order and judgment. In effect, he is seeking that I should pass an ad-interim order which has already been expired so as to enable the applicants to file an appeal. I am of the opinion that the learned Single Judge has already taken a view in the contempt proceedings that the ad-interim order dated 5.8.2004 has come to an end on 13.1.2005 and there is no subsisting orders. In view thereof, and in light of the view I have taken in the present judgment, I do not find it proper to restore the said ad-interim order or pass any afresh ad-interim order in the present proceedings. Thus, the application made by the learned counsel for the restoration of ad-interim order or passing of any fresh ad-interim order is rejected.